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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

OAKRIDGE INVESTORS, LLC, Plaintiff and Appellant, v. NORTHWEST LAND COMPANY, INC., Defendant and Respondent.	C047236 (Super. Ct. No. SCV16708)

In this judgment roll appeal, the trial court's order denying Oakridge Investors, LLC's, (Oakridge) petition to compel arbitration is not supported by the findings contained in that order. The trial court's findings fail to satisfy any of the three available grounds for denying a petition to compel arbitration. We shall reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In 1998, Northwest Land Company, Inc., (Northwest) entered into a development agreement with Thomas Cologna and Peter Hollingshead to develop an apartment complex. Under the terms

of the development agreement, Cologna and Hollingshead were to form a limited liability company (Oakridge) to take title to the land, construct the building, and own and operate it. The development agreement expressly contemplated Northwest would enter into a construction contract to build the apartment complex. In the "Developer's Responsibilities" section of the development agreement, Northwest undertook as one of its obligations to "prevent and avoid construction defects."

The development agreement further contained an arbitration clause which states: "Any dispute between the parties relating to or arising out of this Agreement or breach thereof shall be finally settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association."

Northwest entered into a separate construction contract with Oakridge under which Northwest agreed to construct the building and improvements. That agreement, however, did not contain an arbitration clause.

On January 15, 2002, Northwest sued Oakridge alleging breach of contract and other claims. In April of that year, Oakridge filed a cross-complaint against Northwest seeking damages for breach of contract, construction defects, and indemnity from the claims of the subcontractors arising from Northwest's performance under the construction contract. In that complaint, Oakridge asserted each of these claims was subject to the arbitration clause of the development agreement.

In May 2002, the parties agreed to submit the matter to arbitration. Between May 2002 and February 2004, the parties worked on obtaining the services of the arbitrator.

Northwest takes the position it agreed only to submit the development agreement claims to arbitration and demanded that Oakridge itemize any other claims Oakridge sought to arbitrate before Northwest would agree to submit those claims to arbitration. According to counsel for Northwest, Oakridge failed to provide any information on these "other" claims. Oakridge, on the other hand, contends all controversies between them were subject to arbitration. When the arbitrator refused to resolve this dispute, Oakridge brought a petition to compel arbitration in February 2004.

Northwest opposed arbitration on three grounds: (1) Oakridge did not have standing to enforce the arbitration agreement; (2) the arbitration provision of the development agreement does not contemplate construction defect claims; and (3) Northwest would be prejudiced by the arbitration of the construction defect claims. This third argument was based on the premise that because the construction contract did not contain an arbitration clause, Northwest "did not require an Arbitration Clause with its subcontractors." Essentially, Northwest argued it was unfair under these circumstances to compel arbitration. The matter came on for hearing on March 16, 2004.

The trial court issued its ruling on May 17, 2004. The court ruled: "The Petition to Compel Arbitration, heard

March 16, 2004, is hereby denied. Although Petitioner has standing to compel arbitration and the Developer[’s] Responsibilities provision of the Development Agreement is sufficiently broad enough to cover construction defect claims, Respondent would be substantially prejudiced if forced to arbitrate those claims since the subcontractors would not be part of the arbitration. To delay arbitration under CCP 1281.2 is not warranted.”

Oakridge appeals. Oakridge filed a timely notice of appeal, and this is an appealable order.

DISCUSSION

I

The Arbitration Law And Standard Of Review

“Title 9 of the Code of Civil Procedure (Code Civ. Proc., § 1280 et seq.) is a comprehensive statutory scheme regulating private arbitration. Through this detailed scheme, the Legislature has expressed a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution. As a result, courts will indulge every intendment to give effect to such proceedings.” (*Valsan Partners Limited Partnership v. Calcor Space Facility, Inc.* (1994) 25 Cal.App.4th 809, 816, fn. omitted.)

Code of Civil Procedure section 1281.2 states, in relevant part: “On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and respondent

to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement. [¶] (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction . . . and there is a possibility of conflicting rulings on a common issue of law or fact. . . . [¶] If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit."

Both parties agree we review the trial court's ruling denying a petition to compel arbitration for an abuse of discretion. "The standard of review for an order staying or denying arbitration under [Code of Civil Procedure] section 1281.2, subdivision (c) is the well-known test for abuse of discretion. [Citation.] Thus, the trial court's order will not be disturbed on appeal unless it exceeds the bounds of reason." (*Henry v. Alcove Investment, Inc.* (1991) 233 Cal.App.3d 94, 101.) As for a finding of waiver, there "is no single test to determine whether arbitration has been waived; the determination is a question of fact. A finding of waiver is binding on an appellate court if it is supported by substantial evidence." (*Simms v. NPCK Enterprises, Inc.* (2003) 109 Cal.App.4th 233, 239.)

Here, Oakridge contends the trial court's findings do not support the conclusion it waived its right to arbitration or that grounds to revoke the arbitration agreement existed. Further, Oakridge argues the ruling fails to meet the requirements of the third exception. In reply, Northwest argues the court's ruling should be upheld because the record is incomplete due to Oakridge's failure to supply a reporter's transcript of the hearing on the petition. Northwest further contends the trial court's decision can be upheld as a finding of waiver.

In response to Northwest's first argument, when a case comes to this court and the record consists only of the clerk's transcript, the following rules apply: "the evidence is conclusively presumed to support the findings, and the only questions presented are the sufficiency of the pleadings and whether the findings support the judgment. [Citation.] The question of the sufficiency of the evidence to support the findings is not open. Unless reversible error appears on the face of the record, an appellate court is confined to a determination as to whether the complaint states a cause of action, whether the findings are within the issues, and *whether the judgment is supported by the findings.* [Citations.] Thus, only deficiencies appearing on the face of the record will be considered." (*Bristow v. Morelli* (1969) 270 Cal.App.2d 894, 898, italics added.) Even with this relaxed standard of review, the trial court's order cannot withstand scrutiny.

II

The Trial Court's Findings Do Not Fit The Requirements Of Code Of Civil Procedure Section 1281.2, Subdivision (c)

We turn to the initial argument advanced by Oakridge -- that the court's findings do not support a denial of the petition to arbitrate under Code of Civil Procedure section 1281.2, subdivision (c). Oakridge is correct.

To deny the petition to compel arbitration under Code of Civil Procedure section 1281.2, subdivision (c), the court must find "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction . . . and there is a possibility of conflicting rulings on a common issue of law or fact. . . ."

Here, the trial court's findings fail to satisfy this requirement. The trial court's order suggests there are third parties relevant to this dispute (the subcontractors) and their participation would arise out of the same transaction (the construction project) and arbitrating some claims could subject Northwest to the possibility of conflicting rulings on common issues of law or fact. However, nowhere in the record and, more importantly, nowhere in these findings, is there any reference to a pending court action or special proceeding involving Northwest and these third parties. Indeed, the record is to the contrary. Northwest's counsel declared he needed information from Oakridge on the claims to determine "whether subcontractors would need to be brought into the case." Thus, neither the

trial court's findings nor the record support the denial of the petition to compel arbitration under Code of Civil Procedure section 1281.2, subdivision (c).

Tellingly, Northwest does not argue this subdivision could support the court's order. Northwest merely argues it "could have commenced a separate action against the subcontractors, and delayed the arbitration under [Code of Civil Procedure] section 1281.2(c)." Whether Northwest could have filed an independent action against the subcontractors, or joined the subcontractors in this proceeding, is simply not the same as actually doing what is required by the statute. Thus, the trial court's order cannot be upheld on this ground.

III

The Trial Court's Findings Do Not Support A Claim of Waiver

Northwest argues the trial court's order should be affirmed because Oakridge waived the right to arbitrate. We cannot agree.

First, had the court made an explicit finding of waiver, we would presume that factual finding had evidentiary support under the judgment roll appeal rule we enunciated above. (*Bristow v. Morelli*, *supra*, 270 Cal.App.2d at p. 898.) The trial court, however, made no such finding. It said: Northwest "would be substantially prejudiced if forced to arbitrate those claims since the subcontractors would not be part of the arbitration."

Second, the court's ruling cannot be interpreted as containing an implied finding of waiver. In this regard, Northwest points to: (1) a conflict between the parties as to

the scope of the arbitration agreement; (2) evidence concerning the delay between the status conference agreement and the assertion of the arbitrable construction defect claims; (3) evidence Northwest requested documentation on these claims for a year with no response; and (4) the court's finding Northwest "would be substantially prejudiced if forced to arbitrate those claims since the subcontractors would not be part of the arbitration." These facts do not establish Oakridge waived its right to arbitration.

Waiver "has a number of meanings in statute and case law. [Citation.] 'Generally, "waiver" denotes the voluntary relinquishment of a known right. But it can also mean the loss of an opportunity or a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to . . . relinquish the right.' [Citation.] The varied meanings of the term 'waiver' are reflected in the case law on the enforcement of arbitration agreements. 'In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the "bad faith" or "willful misconduct" of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citation.] [¶] Although a number of authorities properly caution that a waiver of

arbitration is not to be lightly inferred [citation], our cases establish that no single test delineates the nature of the conduct of a party that will constitute such a waiver.'" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 982-983.)

In *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992, the court explained, "In determining waiver, a court can consider '(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party. [Citations.]' [Citation.]"

Here, there is neither a finding, nor evidence in the record to support a finding, that Oakridge voluntarily gave up a known right to arbitrate. There is no finding and no evidence in the record of bad faith or willful misconduct. Northwest does not contend otherwise.

Further, neither the findings nor the record suggest that Oakridge took steps inconsistent with its desire to arbitrate or

that it unreasonably delayed in undertaking the arbitration procedure. Oakridge did not invoke the litigation machinery nor were the parties well into preparation for the lawsuit before Oakridge requested arbitration. There is no evidence that intervening steps had taken place in the litigation. In fact, the record affirmatively demonstrates Oakridge demanded arbitration early and often and did nothing inconsistent with that demand.

"Prejudice in the context of waiver of the right to compel arbitration normally means some impairment of the other party's ability to participate in arbitration." (*Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1197.) The prejudice asserted by Northwest here is that there are third parties who would not be parties to any arbitration that is ordered. As admitted by its opposition papers, this fact was due to the failure of Northwest to require these parties be subject to arbitration agreements because it misapprehended the scope of its arbitration agreements, not due to any act by Oakridge. This is not the type of prejudice that would support a finding of waiver had one been made.

Oakridge's failure to provide an itemized list of its construction defect claims is not an act it was required to perform prior to the submission of the matter to arbitration. The trial court's unimpeached finding the arbitration agreement encompassed these claims renders moot any argument that Northwest had the power to refuse to arbitrate these claims had

they been itemized. Thus, the claim Oakridge failed to itemize those claims is not relevant.

Northwest further cites *Lounge-A-Round v. GCM Mills, Inc.* (1980) 109 Cal.App.3d 190 as support for its argument of an implied finding of waiver. There, the defendant in an action for breach of contract waived its rights to compel arbitration when it initially stated it refused to arbitrate the claim, answered the complaint and filed a cross-complaint without referencing arbitration, and waited nine months while the other party incurred monetary expenses before pursuing the arbitration. (*Id.* at p. 201.) No similar facts appear on the face of this record or in the findings set forth by the trial court, nor do they even appear as argument in the papers Northwest filed in opposition to the petition. Indeed, as we have already demonstrated, the evidence in the record is to the contrary. Northwest's claim that the trial court found Oakridge waived its right to arbitration is without merit.

DISPOSITION

The judgment (order denying petition to compel arbitration) is reversed. Oakridge Investors shall recover its costs on appeal. (Cal. Rules of Court, rule 27(a)(1).)

ROBIE, J.

We concur:

MORRISON, Acting P.J.

HULL, J.